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No. 92-625

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In The

Supreme Court of the United States

October Term, 1992

MR. AND MRS. HENRY A. PLAISANCE, JR.,
Petitioners,

vs.

TEXACO, INC. and CROSBY MARINE SERVICE, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The issue presented by petitioners is moot. Since the Fifth Circuit, *en banc*, repudiated and vacated the "full recovery rule," whether that rule envisioned questions of law or fact is entirely hypothetical and thus irrelevant. Consequently, the petition for certiorari should be denied.

2. The demands of Jones Act uniformity preclude a seaman from maintaining a cause of action for purely emotional injury pursuant to the general maritime law of unseaworthiness and negligence since such an action cannot be maintained under the Jones Act. Because the Fifth Circuit has rejected purely emotional injury claims under the Jones Act, and petitioners have not fairly raised that issue for review, the petition for certiorari should be denied.

LIST OF PARTIES

The following are the parties who have an interest in this proceeding:

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TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties ii

Table of Contents iv

Table of Citations v

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions and Statutes Involved 2

Statement of the Case 2

A. Statement of Facts 4

Summary of Argument 7

Reasons for Denying the Writ 9

I. Petitioners rely on a rule which has been subsequently vacated and repudiated by the Fifth Circuit *en banc.* 10

II. Petitioners do not have a cause of action under the general maritime law for purely emotional injury. .. 14

Conclusion 16

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937) 13

Ainsworth v. Penrod Drilling Corp., 972 F.2d 546 (5th Cir.1992) 8, 12, 16

Aitcheson, Topeca & Santa Fe Railway Co. v. Buell, 771 F.2d 1320 (9th Cir. 1985), affirmed in part, vacated in part, 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987) ...4, 11, 16

Carroll v. Consolidated Rail Corporation, __ U.S. __, 112 S. Ct. 916, 116 L. Ed. 2d 816 (1992) 8, 10, 11, 16

Chedester v. Stecker, 643 F.2d 532 (Haw. 1982) 11

Clomon v. Monroe City School Board, 572 So. 2d 751 (La. 1990) 11

Diaz v. Eastern Airlines, Inc., 698 F. Supp. 18 (D.P.R. 1988) 11

District of Columbia v. Smith, 436 A.2d 1294 (D.C. 1981) .. 12

Dixie Electric Coop v. Citizens of State of Alabama, 789 F.2d 852 (11th Cir. 1986) 13

Gaston v. Flowers Transportation, 866 F.2d 816 (5th Cir. 1989) 8, 12, 13, 15

Contents

Page

Gillespie v. United States Steel Corporation, 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964) 15

Hall v. Beals, 396 U.S. 45, 90 S. Ct. 200, 24 L. Ed. 2d 214 (1969) 1

In Re Hawaii Asbestos Cases, 734 F. Supp. 1563 (D. Hawaii 1990) 11

Jones v. Blinziner, 536 F. Supp. 1181 (N.D. Ind. 1982) 13

Korioth v. Briscoe, 523 F.2d 1271 (5th Cir. 1975) 13

LeJeune v. Rayne Branch Hospital, 556 So. 2d 559 (La. 1990) 11

Lindgren v. United States, 281 U.S. 38, 50 S. Ct. 207, 74 L. Ed. 686 (1930) 15

Liner v. Jafco, Inc. 375 U.S. 301, 84 S. Ct. 391, 11 L. Ed. 2d 347 (1964) 1

Miles v. Apex Marine Corp., 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990) 8, 9, 14, 15

Muchow v. Lindbald, 435 N.W. 2d 918 (N.D. 1989) 12

Plaisance v. Texaco, Inc., 966 F.2d 166 (5th Cir. 1992) (en banc) .....i, 1, 4, 8, 10, 12, 13, 14, 16

Plaisance v. Texaco, Inc., 937 F.2d 1004 (5th Cir. 1991) 3, 8, 9, 10, 11

Contents

Page

Plaisance v. Texaco, Inc., 954 F.23d 266 (5th Cir. 1991) 4, 12

Preiser v. Newkirk, 422 U.S. 395, 95 S. Ct. 2330, 45 L. Ed. 272 (1975) 13

Ray v. Consolidated Rail Corporation, __ U.S. __, 112 S. Ct. 914, 116 L. Ed. 2d 813 (1992) 8, 11, 16

Rodrigues v. State, 472 P.2d 509 (Haw. 1970) 11

Saecho v. Matsakoun, 717 P.2d 165 (Or. Ct. App. 1986) 11

Savard v. Cody Chevrolet, Inc., 234 A.2d 656 (Vt. 1967) ..11, 12

Schlichter v. United States Steel Corp., 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964) 15

St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978) 1

Taylor v. Burlington Northern Railroad Co., 787 F.2d 1309 (9th Cir. 1986) 4

Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) 11

Statutes Cited:

46 U.S.C. § 688 ..... 2, 4

Contents

Page

Louisiana Civil Code, Article 2315.6 11

United States Constitution Cited:

Article III, § 2, Cl. 1 ..... 1, 2

Rules Cited:

Supreme Court Rule 10 ..... 9, 16

Supreme Court Rule 10.1(a) 5

Supreme Court Rule 14.1(a) 4

Fifth Circuit Local Rule 41.3 ..... 1, 4, 12

Federal Rule of Civil Procedure 12(b)(6) 3

Other Authorities Cited:

Bell, The Bell Tolls: Toward Full Tort Recovery for Psychiatric Injury, 36 U. Fla. L. Rev. 333 (1984) 10, 11

Pearson, Liability for Negligently Inflicted Psychic Harm: Response to Professor Bell, 36 U. Fla. L. Rev. 413 (1984) 11

Restatement (Second) of Torts § 436A (1965) 11

Contents

Page

APPENDIX

Appendix A — Local Rules and Internal Operating Procedure of the Fifth Circuit 1a

Appendix B — Letter to Counsel Enclosing Order Dated February 11, 1992 ..... 2a

OPINIONS BELOW

The initial decision with written reasons by the United States District Court for the Eastern District of Louisiana is reported at 735 F. Supp. 686 and appears in Petitioner's Appendix A. The ruling on motion for new trial, by "Minute Entry" dated March 7, 1990, is unreported and appears at Petitioner's Appendix B.

The panel opinion of the United States Court of Appeals for the Fifth Circuit is reported at 937 F.2d 1004 and appears at Petitioner's Appendix C. Rehearing *en banc* was ordered at 954 F.2d 266 and appears at Petitioner's Appendix D. By granting rehearing *en banc*, the Fifth Circuit vacated the earlier panel decision pursuant to Fifth Circuit Local Rule 41.3, which appears at Respondents' Appendix A, (1a). The opinion of the U.S. Court of Appeals for the Fifth Circuit *en banc* is reported at 966 F.2d 166 and appears at Petitioner's Appendix E.

STATEMENT OF JURISDICTION

Respondents object to the jurisdiction of this Court to decide whether application of the "new rubric" or "full recovery rule" is a determination of law or fact. As noted in the body of Respondents' Brief in Opposition to Petition for Writ of Certiorari, that question has been rendered moot by the *en banc* ruling of the United States Court of Appeals for the Fifth Circuit in *Plaisance v. Texaco, Inc.*, 966 F.2d 166, which abandons that rule. As the "new rubric" no longer exists, there is no actual case or controversy before this Court. Accordingly, jurisdiction is improper. U.S. Const., Art. III, § 2, Cl. 1; *Hall v. Beals*, 396 U.S. 45, 90 S. Ct. 200, 24 L. Ed. 2d 214 (1969); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978); *Liner v. Jafco, Inc.*, 375 U.S. 301, 84 S. Ct. 391, 11 L. Ed. 2d 347 (1964).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Merchant Marine Act (The Jones Act), 46 U.S.C § 688(a) (West 1992):

> (a) Application of Railway Employee Statutes; Jurisdiction
>
> Any seaman who shall suffer pesonal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . .

2. U.S. Const., Art. III, § 2, Cl. 1.

> Jurisdiction of Courts: Section 2.
>
> The judicial Power of the United States shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; . . . to all Cases of admiralty and maritime Jurisdiction; . . .

STATEMENT OF THE CASE

Henry Plaisance and his wife filed suit in the United States District Court for the Eastern District of Louisiana, on June 14, 1989, claiming that an accident occurring on January 29, 1989, caused petitioners to suffer "injuries to their minds and bodies." Texaco Inc. and Crosby Marine Service, Inc. (hereinafter "Texaco"

and "Crosby") were named as defendants. Petitioners claimed damages for "loss of consortium, pain and suffering, disability and loss of wages, past, present, and future." Texaco and Crosby answered the suit denying liability. After a period of time to conduct discovery, Texaco and Crosby moved for summary judgment or to dismiss pursuant to F.R.C.P. Rule 12(b)(6) all claims based on purely emotional injury. Excluded from Texaco's and Crosby's motion was Plaisance's claim for maintenance and cure and personal injury resulting from an alleged fall occurring subsequent to the events leading to the emotional injury claim.

The only issue the district court found properly before it was the petitioners' claims based on purely emotional injury. The district court held that neither the general maritime law (including the doctrine of unseaworthiness) nor the Jones Act recognized a cause of action for purely emotional injury, granted the motion of Texaco and Crosby and dismissed petitioners' complaint. On January 30, 1990, judgment was entered in favor of respondents, Texaco and Crosby.

Subsequently, Mr. and Mrs. Plaisance moved the district court to reconsider or for a new trial. Texaco and Crosby opposed this motion and the district judge denied the motion by order entered March 8, 1990.

Thereafter, on May 14, 1990, petitioners' filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. After oral argument, the Fifth Circuit panel issued its opinion, affirming the district court's order and judgment of dismissal on August 9, 1991 *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir. 1991). Despite affirming the lower court, the Fifth Circuit panel purported to create a new cause of action under the Jones Act for purely emotional injuries. This cause of action was to be measured by a "new rubric" called the "full-recovery rule." Petitioners then filed a petition for panel rehearing on August 21, 1991. That petition was rendered moot by the Fifth Circuit's *sua sponte* order

directing rehearing *en banc*, dated February 11, 1992. *Plaisance v. Texaco, Inc.*, 954 F.2d 266 (5th Cir. 1991). By granting rehearing *en banc*, the Fifth Circuit vacated the earlier panel decision. *See* Fifth Circuit Local Rule 41.3 and letter to counsel of record from Gilbert F. Ganucheau, Clerk of the United States Court of Appeals for the Fifth Circuit at 2a. After rehearing *en banc*, the Fifth Circuit affirmed the district court's dismissal of Plaisance's emotional injury claims but repudiated the remainder of the panel's prior holding. *Plaisance v. Texaco, Inc.*, 966 F.2d 166 (5th Cir. 1992). By that decision, the Fifth Circuit, *en banc*, realigned itself with all, save one, of the federal circuits, uniformly denying recovery for purely emotional injury under the Jones Act and general maritime law.[1]

On October 9, 1992, petitioners filed a petition seeking a writ of certiorari to the Fifth Circuit. Petitioners do not seek review from the Fifth Circuit's ruling recanting the "new rubric" or "full-recovery" rule created by the prior panel decision.[2] Rather, they curiously request this Court to determine whether that now defunct rule is a question of law or fact and whether it allows a cause of action for purely emotional injury under the general maritime law.

A. Statement of Facts

Henry Plaisance was a tug captain of long experience, having

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1. The Ninth Circuit stands alone among the federal courts in finding a "wholly mental injury" compensable under the FELA [made applicable to the Jones Act, 46 U.S.C. § 688] "regardless of its characterization as mental or physical." *Aitcheson, Topeca & Santa Fe Railway Co. v. Buell*, 771 F.2d 1320, 1324 (9th Cir. 1985), *affirmed in part, vacated in part*, 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987). In *Taylor v. Burlington Northern Railroad Co.*, 787 F.2d 1309 (9th Cir. 1986), then Judge Kennedy, now Justice Kennedy, expressed serious reservations about the Ninth Circuit's *Buell* decision but felt compelled to follow it as precedent in the Ninth Circuit.

2. *See* Rule 14.1(a) of the Rules of the Supreme Court.

worked more than ten years with Crosby Marine Service, Inc. or its predecessor companies. Indeed, Plaisance had worked in the maritime oil field for over 30 years. He had seen gas flared on a number of occasions. Yet on the day of his "accident" he saw an oil field fire which caused no damage to his vessel and injured no one, but allegedly caused Plaisance to be totally, emotionally disabled.

On January 29, 1989, Plaisance was the captain in charge of the tug TOMMY CROSBY. This vessel is owned by Crosby Marine and was under charter to Texaco. The vessel was operating in Texaco's Caillou Island Field, a producing oil field located in the coastal waters of Terrebonne Parish, Louisiana. On this day, the TOMMY CROSBY was towing a barge loaded with equipment used to work over and plug abandoned oil wells. Plaisance and others had been working with this barge for several months. A crew working on the barge would perform plug and abandonment operations on depleted Texaco wells. Plaisance, as operator of the TOMMY CROSBY, would tow the barge from well to well as the work progressed. Texaco also had under charter a tug named VERGIE CENAC to assist in this operation.

At approximately 7:00 a.m. on January 29, 1989, the TOMMY CROSBY was towing the barge to a new well location in the Caillou Island Field. The tug VERGIE CENAC was tied to the stern port quarter of the barge. While in route to the new location, the TOMMY CROSBY or her tow, with Captain Plaisance at the helm, struck a pipeline causing gas or other hydrocarbons to erupt and subsequently ignite and burn.

This fire caused some damage to the barge, specifically the structure located on the barge which provided the plug and abandonment crew with living quarters. The fire also damaged the VERGIE CENAC. However, the fire did not cause any damage to the tug TOMMY CROSBY.

Since Plaisance's vessel was at all times safely removed from

the fire, it became the safe haven to which all fled. In order to escape the fire, the barge crew abandoned the barge and boarded the TOMMY CROSBY which had backed up to the barge. The crew from VERGIE CENAC also boarded the TOMMY CROSBY via the barge. Captain Plaisance then steered the barge away from the area of the fire.

Several vessels working in the Caillou Island Field responded to the fire and the crews of these vessels extinguished the fire on the barge and the tug VERGIE CENAC in less than half an hour. Plaisance remained on the TOMMY CROSBY during the entire episode and did not assist in fighting the fire.

On the TOMMY CROSBY, Plaisance was at all times a good distance from the fire. Plaisance testified that he operated the controls of the TOMMY CROSBY from the rear of the vessel. He stated that the TOMMY CROSBY was about sixty feet long, that the tow line was approximately ten feet long, and the barge was about 130 feet long.

Neither Plaisance nor anyone else received any injuries whatsoever as a result of this fire.

After the fire was extinguished, the VERGIE CENAC, the barge, and the TOMMY CROSBY, with the assistance of another tug, proceeded to Texaco's operting facility in the Caillou Island area. Several hours later, Plaisance piloted the TOMMY CROSBY from Caillou Island to Cocodrie, Louisiana. This trip took approximately three and one half to four hours. Upon arrival in Cocodrie, Plaisance, for the first time, complained to Texaco's representative, Henry Prejean, that he could not continue as captain of the TOMMY CROSBY and asked to be relieved.

Later that same day, Plaisance was admitted to Our Lady of the Sea Hospital in Galliano, Louisiana, where he was treated for a few days and was then admitted to Bayou Oaks Psychiatric Hospital in

Houma, Louisiana, where he was treated as an in-patient for approximately forty-five days. He was released, and then readmitted and treated again for several weeks as an in-patient. Plaisance has continued to receive psychiatric care from time to time since the accident.

In deposition testimony, Captain Plaisance expressed a disinclination and inability to return to work as a tug captain. Plaisance was diagnosed as suffering from post-traumatic stress disorder and depression by Dr. D. F. Carlos. Dr. Carlos testified he was baffled by Plaisance's inability to recover from this condition, and that initially he had expected Plaisance to return to work in aproximately three weeks following his admission to the psychiatric hospital.

At the time of his deposition, Henry Plaisance complained of nervousness, anxiety, nightmares, headaches and neck pain. Plaisance seemed to attribute the headaches and neck pain to his alleged slip and fall accident, which the district court found was unrelated to the purely emotional injury claim. According to Dr. Carlos, Plaisance's complaints did not have a physical or physiological cause. Rather, the alleged complaints appear to be wholly psychological.

Plaisance claims total disability based on a purely emotional condition, characterized as post-traumatic stress disorder, unaccompanied by any physical trauma.

SUMMARY OF ARGUMENT

The petitioners in this matter have not shown any reason, within the considerations governing review of a writ of certiorari, why the Court should grant this petition. The petitioners' contention begins with the proposition that a seaman may recover for wholly emotional injuries under a "new rubric" or "full-recovery rule" created by a panel of the Fifth Circuit in *Plaisance v.*

Texaco, Inc., 937 F.2d 1004 (5th Cir. 1991) (*Plaisance I*). They ask this Court to determine whether application of the "new rubric" is a determination of law or fact. Unfortunately, petitioner's ignore the fact that the "new rubric" or "full-recovery rule" was vacated and repudiated by the subsequent *en banc* decision in *Plaisance v. Texaco, Inc.*, 966 F.2d 166 (5th Cir. 1992) (*Plaisance II*). In vacating the panel decision in *Plaisance I*, the Fifth Circuit *en banc* returned to the rule enunciated in *Gaston v. Flowers Transportation*, 866 F.2d 816 (5th Cir. 1989), which precludes claims for purely emotional injuries of the type alleged and described by Plaisance. *Plaisance II*, 966 F.2d at 169; *see also, Ainsworth v. Penrod Drilling Corp.*, 972 F.2d 546 (5th Cir. 1992). By thus holding, the *en banc* court corrected the anomaly created by the original *Plaisance* panel and returned to the standard adopted by both common law and federal jurisprudence. *Carroll v. Consolidated Rail Corporation*, __ U.S. __, 112 S. Ct. 916, 116 L. Ed. 2d 816 (1992); *Ray v. Consolidated Rail Corporation*, __ U.S. __, 112 S. Ct. 914, 116 L. Ed. 2d 813 (1992) (Justices White and Thomas dissenting from denial of writs). Since no "new rubric" or "full-recovery rule" survived the order granting rehearing *en banc*, nor the *en banc* decision in *Plaisance II*, petitioners' request that this Court decide whether the rule is a question of law or fact is necessarily moot. Indeed to render such a decision now would be wholly hypothetical and thus advisory.

Further, there is no basis for petitioners' proposition that the general maritime law will entertain recovery for purely emotional injury when the Jones Act will not. *Plaisance II*, 966 F.2d at 196 (reaffirming *Gaston* as the rule of the Fifth Circuit for emotional injury recovery). This Court has consistently sought to maintain a uniform system of recovery under the Jones Act and the general maritime law. *Miles v. Apex Marine Corp.* 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990). Even though the general maritime law is a "living, breathing body of law" as alleged by petitioners, this Court has made clear that the law must live and breathe within

congressionally mandated restrictions enuciated in the Jones Act. As noted by this Court, "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action . . . than Congress has allowed in cases of death [or injury] resulting from negligence." *Miles*, 111 S. Ct. at 326. Allowing recovery for purely emotional injury under the general maritime law, while not recoverable under the Jones Act, would create an inconsistency in the law which would undermine the uniformity this Court has consistently strived to maintain in the area of seamen's recovery. Further, petitioner cannot point to a single case where wholly emotional injuries have been compensated under the general maritime law. The rule in the Fifth Circuit is that such damages are not recoverable under that regime. Petitioners thus fail to allege any grounds, within the meaning of Rule 10 of the Rules of the Supreme Court, to justify the granting of a writ on this issue.

In all, there is no basis for the proposition tht the Jones Act will allow recovery for a purely emotional injury under the "new rubric" cited by petitioner. That rule no longer exists in the United States Court of Appeals for the Fifth Circuit. Further, no other federal circuit has recognized that rule. Since the Jones Act does not recognize recovery for purely emotional injury, uniformity demands that none be created under the general maritime law. The instant petition raises neither a conflict among the circuits nor "an important question of federal law which has not been, but should be, settled by" the United States Supreme Court. Accordingly none of the criteria under Rule 10 of the Rules of the Supreme Court apply to the present petition.

REASONS FOR DENYING THE WRIT

Petitioners' action in raising the instant writ are indeed curious. The panel decision in *Plaisance I*, 937 F.2d 1004 (5th Cir. 1991), was vacated and repudiated by the subsequent *en banc*

decision in *Plaisance II*, 966 F.2d 166 (5th Cir. 1992). As such, no "new rubric" or "full-recovery rule" survives. Rather than seek review of that decision, petitioners ask this Court to issue an advisory opinion on whether the "new rubric," which no longer exists, forms a question of law or fact. Such a request is flawed on its face and must be denied. Second, petitioners have asked this Court to allow recovery for wholly emotional injury under the general maritime law. Since such recovery has been precluded under the Jones Act, uniformity demands its preclusion under the general maritime law. For these reasons, the Court should deny the instant petition for writ of certiorari.

I.

PETITIONERS RELY ON A RULE WHICH HAS BEEN SUBSEQUENTLY VACATED AND REPUDIATED BY THE FIFTH CIRCUIT *EN BANC*.

Petitioners make much of the "new rubric" or "rule" established by a panel of the Fifth Circuit in *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir. 1991) (*Plaisance I*). Termed the "full-recovery rule," this new cause of action provided for recovery for the negligent infliction of emotional distress where "a reasonable person normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances." *Id.* at 1010.

The "full-recovery rule," finding its origin in a legal tome and abandoned jurisprudence, was not consistent with prior Fith Circuit precedent and went far beyond the law of other federal circuits.[3] *See Carroll v. Consolidated Rail Corporation*, ___ U.S.

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3. The panel in *Plaisance I* relied on a law review article, Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychiatric Injury*, 36 U. Fla. L. Rev. 333 (Cont'd)

__,112 S. Ct. 916, 116 L. Ed. 2d 816 (1992); *Ray v. Consolidated Rail Corporation*, ___ U.S. ___, 112 S. Ct. 914, 116 L. Ed. 2d 813 (1992) (Justice White, dissenting from denial of writ, highlights the decision in *Plaisance I* as creating a rift in the federal circuits regarding recovery for purely emotional injuries). Further, the "new rubric" developed by the Fifth Circuit panel was alien to common law developments from which a court must "glean guidance."[4] *Aitcheson, Topeka and Santa Fa Railway Co. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410, 1417, 94 L. Ed. 2d 563 (1987); *see Restatement (Second) of Torts* § 436 A (1965); *Diaz v. Eastern Airlines, Inc.*, 698 F. Supp. 18, 21 (D.P.R. 1988); *Saecho v. Matsakoun*, 717 P.2d 165, 169 (Or. Ct. App. 1986); *Savard v. Cody*

(Cont'd)

(1984) and a Hawaii Supreme Court case. *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970). Professor Bell has been severly criticized. *See* Pearson, *Liability for Negligently Inflicted Psychic Harm: Response to Professor Bell*, 36 U. Fla. L. Rev. 413, 419-420 (1984) (wherein Professor Pearson addresses the danger of "soften psychic hides" as a result of Bell's full recovery rule). Further, the Supreme Court of Hawaii has subsequently restricted the scope of *Rodriguez* in *Chedester v. Stecker*, 643 F.2d 532 (Haw. 1982). *See also, In Re Hawaii Asbestos Cases*, 734 F. Supp. 1563 (D. Hawaii 1990).

4. Plaintiff is incorrect concerning the application of Louisiana state law to this action. In FELA and Jones Act cases, the federal courts are fashioning federal common law. Thus, federal courts do a disservice to federal uniformity by adopting the law of the state in which they sit. Rather, they sould take a broad approach, "glean[ing] guidance from common law developments." *Buell*, 107 S. Ct. at 1417; *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949). Even if Louisiana state law were to apply, recovery in this context would be denied. Under Article 2315.6 of the Louisiana Civil Code, a person who witnesses an event causing harm to another may recover for his mental anguish or emotional distress *only* if the victim is a relative. La. C.C. art. 2315.6(A) (legisltaively limiting *LeJeune v. Rayne Branch Hospital*, 556 So. 2d 559 (La. 1990) and *Clomon v. Monroe City School Board*, 572 So. 2d 751 (La. 1990)). Since petitioner has not alleged that he was related to anyone involved, much less injured, in the fire, he cannot recover under Louisiana law even if it were applicable.

Chevrolet, Inc., 234 A.2d 656, 660 (Vt. 1967); *Muchow v. Lindbald*, 435 N.W. 2d 918 (N.D. 1989); *District of Columbia v. Smith*, 436 A.2d 1294, 1296 (D.C. 1981).

Recognizing the panel's revolution in an area of law more fit for evolution, the Fifth Circuit, *sua sponte*, ordered rehearing of the panel's decision *en banc*.[5] *Plaisance v. Texaco, Inc.*, 954 F.2d 266 (5th Cir. 1991). On rehearing, 966 F.2d 166 (*Plaisance II*), the *en banc* court affirmed dismissal of plaintiff's claim for emotional injuries but repudiated the prior panel's *dicta*. *See Plaisance I*, 937 F.2d at 1013 (Jones, J., concurring in part and dissenting in part). The "new rubric" or "full-recovery rule" fell to prior circuit precedent enunciated in *Gatson v. Flowers Transportation*, 866 F.2d 816 (5th Cir. 1989). *See Plaisance II*, 966 F.2d at 169. The rule of *Gaston*, forming the present law of the Fifth Circuit, does not sanction claims for purely emotional injuries of the type alleged and described by Plaisance. *Plaisance II*, 966 F.2d at 169; *see also, Ainsworth v. Penrod Drilling Corp.*, 972 F.2d 546, 547 (5th Cir. 1992) (physical impact rule enumerated in *Gaston* is rule of Fith Circuit after *Plaisance II*).

As noted by the Fifth Circuit, extension of the Jones Act or general maritime law, to cover purely emotional injury "would represent a major departure from existing jurisprudence, as well as a vast extension of potential employer exposure to damages." *Gaston*, 866 F.2d at 819. Further, the circuit found "something incongruous" in allowing this type of recovery for seaman since:

> [T]hese [persons] have knowingly and voluntarily chosen a calling which, while today perhaps not fairly termed dangerous, yet does involve braving certain an hazards and are

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5. Under Fifth Circuit Local Rule 41.3, the effect of the court's granting rehearing *en banc* was to vacate to prior panel decision. *See* 1a, *infra*.

> traditionally not well suited to the squeamish or faint hearted. To undertake to enlarge such persons in damages in proportion to the delicacy of their emotional reaction seems a curious policy. For these reasons, therefore, we conclude that such a giant step as [claimant] proposes that we take is while perhaps an appropriate one for consideration by the legislature, not a proper one for a court to take.

866 F.2d at 810.

Since no "new rubric" or "full-recovery rule" survived *Plaisance II*, Plaisance's petition, requesting this Court to decide whether the rule is a question of law or fact, is necessarily moot. Indeed to render such a decision now would be wholly hypothetical and thus advisory. This Court has demanded that a case consist of a "real and substantial controversy admitting of specific relief as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241, 57 S. Ct. 461, 464, 81 L. Ed. 617 (1937). Simply put, a federal court is not empowered to render advisory opinions or decide questions that do not effect the rights of litigants in the case before them. *Preiser v. Newkirk*, 422 U.S. 395, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975); *Korioth v. Briscoe*, 523 F.2d 1271, 1274-75 (5th Cir. 1975); *see also, Dixie Electric Coop v. Citizens of State of Alabama*, 789 F.2d 852, 857 (11th Cir. 1986); *Jones v. Blinziner*, 536 F. Supp. 1181, 1191 (N.D. Ind. 1982). As such, this Court should refuse petitioner's invitation to decide whether a rule, which no longer exists, forms a question of law or fact.

II.

PETITIONERS DO NOT HAVE A CAUSE OF ACTION UNDER THE GENERAL MARITIME LAW FOR PURELY EMOTIONAL INJURY.

The second question addressed to this Court by petitioners concerns whether a seaman has a cause of action for purely emotional injuries under the general maritime law of negligence and unseaworthiness. As previously discussed, *Plaisance II*, returning to the rule of *Gaston*, precludes such recovery under the Jones Act. The general maritime law cannot entertain recovery for the purely emotional injury of a seaman where the Jone Act does not. As noted by this Court in *Miles v. Apex Marine*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990), the Jones Act was specifically enacted to "establish a uniform system of seaman's tort law." *Id.* at 324. Uniformity demands that general maritime law recovery be limited to that available under the Jones Act:

> Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them.

Miles, 111 S. Ct. at 327.

Thus, courts are not free to create under their admiralty powers remedies which are deemed precluded by congressional enactments, for:

> We no longer live in an era when seaman and their loved ones must look primarily to the courts as the source of substantive legal protection from injury and death. . . .

Miles, 111 S. Ct. at 323.

Since Plaisance cannot recover under the Jones Act for purely emotional injuries, he is barred from recovery under the general maritime law. To hold otherwise, would upset the uniformity this Court has consistently strived to maintain in the realm of Jones Act recovery. *See Miles v. Apex Marine Corp.*, 111 S. Ct. 317; *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964); *Schlichter v. United States Steel Corp.*, 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964); *Lindgren v. United States*, 281 U.S. 38, 50 S. Ct. 207, 74 L. Ed 686 (1930).

Aside from questions of uniformity, clear Fifth Circuit precedent has established that there is no recovery for purely emotional injuries under the doctrine of unseaworthiness:

> The ancient right to recover for unseaworthiness is limited to recovery for "loss of earnings, past and prospective, . . . medical expenses . . . and also an additional sum on account of [claimant's] *physical injuries* and for pain and suffering."

Gaston, 866 F.2d at 821 (emphasis added) (citations omitted). Petitioners have cited no case allowing recovery for wholly emotional injury under the general maritime law. The absence of case law supporting such recovery necessarily leads to one conclusion: the physical injury limitation is well established in admiralty and universally applied. Accordingly, petitioners fail to allege any basis which would impel this Court to exercise its discretion in favor of granting writ on this issue. *See* Rule 10.1(a) of the Rules of the Supreme Court.

CONCLUSION

Petitioners in the instant action have failed to allege any issue worthy of this Court's attention. It is clear that the "new rubric" or "full-recovery rule" no longer exists. *Plaisance II*, 966 F.2d 166 (5th Cir. 1992); *Ainsworth*, 972 F.2d at 547. Whether the "new rubric" is a question of law or fact is therefore moot. Since the "new rubric" has no application under the Jones Act, uniformity demands that it not be adopted in the general maritime law. Accordingly, petitioners have no cause of action for purely emotional injury under that regime.

Even overlooking the issue of mootness and uniformity, the petitioners have not demonstrated any special or important reasons why a writ of certiorari should be granted in the instant action. There is neither a conflict among the circuits nor "an important question of federal law which has not been, but should be, settled by" the United States Supreme Court. *See* Rule 10 of the Supreme Court Rules. Far from creating a conflict, *Plaisance II* returns the Fifth Circuit to a rule espoused by both the federal circuits and common law authority. Further, this Court has declined, on several occasions, the invitation to create a broad rule of recovery for purely emotional injury under the FELA or Jones Act. *Buell*, 107 S. Ct. at 1418; *Carroll v. Consolidated Rail Corporation*, 112 S. Ct. 916; *Ray v. Consolidated Rail Corporation*, 112 S. Ct. 914. In so holding, this Court has settled the issue of recovery for wholly emotional injury under the Jones Act, leaving it to the federal circuits to fashion a rule based on a ". . . precise application of developing legal principles to the particular facts at hand." *Buell*, 107 S. Ct. at 1418. The particular facts of this case do not warrant petitioners' recovery under any theory of liability, much less the now silenced "new rubric."

For the foregoing reasons, this Court should deny the instant petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A — LOCAL RULES AND INTERNAL OPERATING PROCEDURE OF THE FIFTH CIRCUIT

LOCAL RULE 41

41.3 EFFECT OF GRANTING REHEARING *EN BANC*
Unless otherwise expressly provided, the effect of granting a rehearing *en banc* is to vacate the panel opinion and judgment of the Court and to stay the mandate.

APPENDIX B — LETTER TO COUNSEL ENCLOSING ORDER DATED FEBRUARY 11, 1992

United States Court of Appeals
Fifth Circuit
Office of the Clerk

Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130

February 11, 1992

TO ALL COUNSEL LISTED BELOW:

No. 90-3183 — Plaisance v. Texaco, Inc.

Dear Counsel:

Enclosed is an order this day entered by the Court directing that this case be reheard *en banc* with oral argument.

Under Fifth Circuit Local Rule 41.3 the effect of granting a rehearing *en banc* is to vacate the previous opinion and judgment of this Court and to stay the mandate.

Pursuant to this court's direction for the Clerk to specify a briefing schedule for the filing of suplemental briefs, appellants will have until March 12, 1992, for filing their supplemental brief, with appellees' suplemental brief to be filed in this office not later than April 10, 1992. The case is tentatively scheduled for hearing during the week of May 11, 1992, therefore no extensions of time will be authorized. Counsel for the parties will receive adequate notice as to the exact date and time for the presentation of the oral argument.

Appendix B

All parties are requested to furnish twenty (20) copies of their supplemental brief, and *opening briefs* and *Record Excerpts* previously filed, for the use of the *en banc* court.

Very truly yours,

[Signature]
Gilbert F. Ganucheau

GFG/jmg
Enclosure

Mr. Joseph J. Weigand, jr.
Mr. David E. Faure
Mr. J. Ralph White

cc: Hon A.J. Mcnamara